

Navigating *Dobbs*: A Guide for Small Businesses

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In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court overturned *Roe v. Wade*, eviscerating the fundamental right to reproductive health. The civil rights implications are overwhelming. While we have not yet seen the extent of the decision's impact, the radical rollback of healthcare access will disproportionately impact people of color and low-income individuals, as well as exacerbate pre-existing health and economic disparities. Public and private actors at all levels must step up aggressively to protect reproductive health.

Lawyers for Civil Rights (LCR) is deeply and unequivocally committed to ensuring equal access to healthcare for all and will continue to fight for healthcare justice for our client communities. Produced at the intersection of LCR's [BizGrow](#) and [HealthJustice](#) initiatives, this guide is designed to help small businesses – and their employees – navigate *Dobbs* and its aftermath.

Please note that the law is changing quickly, and we are making every effort to keep this content up-to-date.

Q: Are your employees who live in MA currently able to seek abortion care?

Your employees should feel secure in accessing abortion care throughout the Commonwealth of Massachusetts.

Massachusetts has some of the [most protective abortion policies](#) in the country. Following the *Dobbs* decision, Massachusetts continues to prioritize reproductive health care access. [On July 29](#), Massachusetts passed a new reproductive rights law that [removes cost barriers to abortion care](#), expands access to third-trimester abortions in cases of grave fetal diagnosis, increases access to emergency contraception and medication abortion, and guarantees the right to gender-affirming care. In a recent visit, [Vice President Harris](#) called the new Massachusetts law “a national model for protecting reproductive rights on the state level.”

Q: What if your employee lives in a state that restricts reproductive access (“non-free state”) and needs to cross state lines to secure healthcare?

While looming legal battles will clarify the limits of businesses' ability to support their employees seeking abortion care, here is what you should know now:

1. *Your employees can cross state lines to seek abortion care without facing legal repercussions.*

[No current state laws criminalize crossing state lines](#) to seek an abortion.

2. *Advising employees in need of abortions about the availability of abortion care out-of-state is a constitutionally protected activity.*

The First Amendment protects speech, including advising individuals about abortion laws in other states. That said, there is no guarantee that states will refrain from attempting to [enforce abortion restrictions](#) in violation of freedom of speech or other constitutional rights. The Supreme Court's recent actions have complicated these protections and it will likely take some time to have clear answers as they wade through the morass of [lawsuits that will arise](#).

3. *Offering travel reimbursements to employees who must travel out-of-state to receive abortion care may subject your business to legal liability.*

[States with restrictive abortion laws may attempt to prosecute businesses](#) civilly, and potentially criminally, for reimbursing abortion-related travel costs for employees who live in those states. For example, since [the Texas abortion ban](#) imposes civil liability for “aiding and abetting” abortions, Texas may take the position that corporate reimbursement policies “aid and abet” illegal abortions in violation of state law. Indeed, state lawmakers in Texas have already [threatened Citigroup and Lyft with legal repercussions](#) if they implement the travel reimbursement policies they announced.

4. *Alternate support mechanisms, such as helping your employees permanently relocate to free states or creating general health relief funds, may be less legally risky.*

[Numerous models](#) exist for helping employees in non-free states seeking abortions, some of which may be less likely to trigger penalties and liability. For instance, [Johnson & Johnson](#) has offered to cover travel expenses for all medical care not available within a certain distance from employees’ homes. [Salesforce](#) has committed to helping employees worried about their access to abortion care permanently relocate. Massachusetts may [encourage companies based in non-free states to relocate here](#) due to the State’s enduring abortion protections.

5. *Businesses should consider instituting measures that protect employees’ health while minimizing the retention of sensitive medical information.*

Employees may be concerned about confidentiality when seeking support in obtaining out-of-state abortions. To help [alleviate these concerns](#), you may consider allocating resources without requiring health information disclosure.

For instance, some companies, like Yelp, [administer their travel abortion benefits through insurance providers](#), eliminating the need for an employee to disclose confidential health information to direct supervisors.

Q: What if an employee helps an out-of-state person obtain an abortion and is charged with alleged “aiding and abetting”?

While looming legal battles will clarify the limits of an individual’s ability to support out-of-state visitors seeking abortion care, here is what you should know now:

1. *The scope of activities considered “aiding and abetting” is not yet clear and varies from state to state.*

Abortion access is [under imminent threat in many states](#), and the restrictive laws vary in language and scope. The [Texas abortion ban](#) explicitly imposes liability for “aiding and abetting,” which includes “reimbursing the costs of an abortion through insurance or otherwise.” South Carolina is even contemplating a bill that would make it illegal to provide information that is [“reasonably likely to be used for an abortion”](#). Individuals attempting to help out-of-state visitors should research the law governing abortion in the respective visitor’s state of residence to determine the manner of support one can legally provide. The legal repercussions of providing financial support, transportation, or other resources to abortion-seeking visitors from other states remains unclear.

2. *Certain forms of support, such as advocacy and making donations to abortion funds, are constitutionally protected activities.*

Certain forms of support should remain immune from legal liability. [Currently, no state laws criminalize crossing state lines](#) to seek an abortion, and it is generally legal to [promote activities that are not crimes](#) in one’s own state. In addition, the U.S. Supreme Court has validated that both [commercial encouragement of abortion](#) and [donating to charities](#), such as abortion funds, fall within First Amendment protections.

3. *Your ability to counsel employees regarding their support of out-of-state abortion patients is also constitutionally protected.*

Free speech, including advising employees regarding their support of out-of-state visitors seeking abortions, is a constitutionally protected activity. That said, there is no guarantee that states will refrain from [enforcing abortion restrictions](#) in violation of freedom of speech or other constitutional rights. The Supreme Court’s recent actions have complicated these protections and it will likely take some time to have clear answers as they wade through the morass of [lawsuits that will arise](#). However, there is sound legal precedent protecting employers’ ability to counsel employees.

4. *Massachusetts will not extradite individuals charged under other states' abortion bans, but that may not be enough to forestall all prosecutions.*

An [Executive Order](#) and recent [legislation](#) bar the Commonwealth from cooperating with extradition attempts from other states pursuing criminal charges related to the receipt or performance of reproductive healthcare services, including abortion. However, other states' restrictive laws could embolden rogue law enforcement officials even in Massachusetts to collaborate with other states' attempts to criminalize interstate travel for abortion care. For more information, please read this recent LCR article noting that: "It would only take one anti-choice official to facilitate an interstate prosecution, and thereby undermine Massachusetts' protections," *available at* <https://www.latinorebels.com/2022/08/23/roeabortionimmigrants/>.

Q: Will insurance access be affected?

Generally, coverage for employees arises in two contexts:

1. [Employers offering fully-insured coverage](#) purchase insurance from an insurance company.
 - o [As of August 1](#), eleven states restrict coverage for abortion services in all private insurance policies written in those states, but that number is subject to increase. Additionally, 25 states restrict abortion coverage in plans offered through health exchanges.
 - o When a state restricts abortion services within its borders, any insurance company licensed by the state to issue insurance policies to employers and individuals in that state are unable to provide covered abortion services within that state, as [insurance is regulated by state law](#).
 - o [Many fully-insured plans](#) operating in states where abortion is no longer legal may have in-network providers in other states and/or may provide coverage for out-of-network services. These fully-insured carriers could continue to pay claims for abortion services provided in states where abortion remains legal.
 - o Fully-insured employers that function in states that prohibit insurance coverage for abortion services must consider alternative methods if they wish to continue providing assistance for such services. Employers should consult benefit consultants and lawyers to do so given the possible legal ramifications.

2. [Employers offering self-insured coverage](#) provide health benefits directly to employees.

Employers who offer [self-insured](#) health care plans for abortion services should be able to continue to do so for their benefits-eligible employees whether or not their employees live in a state that has [banned coverage for abortion services](#), because such plans are governed by the [Employee Retirement Income Security Act of 1974](#) (ERISA). As a federal law, ERISA would be expected to “preempt” state law related to an employee’s insurance plan.

- If an employer’s self-insured plan has out-of-network coverage, employees would likewise be able to seek abortion services from an out-of-network provider, though those services would be covered at the out-of-network benefit level, [likely ensuing higher out-of-pocket costs](#) to the employee.

Q: What are other companies – large and small – doing for employees?

Business owners are trying to figure how they can support their employees seeking abortions. At this time, it is unclear how widespread the expansion of abortion-related benefits will be, but many companies have already begun to make changes.

Reimbursement pledges are the most high-profile commitments that businesses have made since the *Dobbs* ruling. [Amazon](#) will pay up to \$4,000 in travel expenses annually for employees to undergo abortions in states where the procedure is legal. Amazon joins a host of other large companies such as, [Disney](#), [Goldman Sachs](#), [JP Morgan](#), [Starbucks](#) and [others](#), supporting their employees’ access to abortions.

In early June, a [survey](#) of more than 1000 HR professionals by the Society for Human Resource Management Institute, shortly after the draft decision had been leaked, found:

- The top five resources or benefits they currently provide to employees to better support reproductive care, which includes abortion access, are:
 - Paid time off (PTO) to access reproductive care (32%)
 - Unpaid time off to attend marches protests, demonstrations, and similar events in support of reproductive rights (18%)
 - PTO to attend marches, protests, demonstrations, and similar events in support of reproductive rights (15%).

- Travel expense benefits (gasoline, airfare, hotels) outside of a health savings account (HSA) for employees to access abortion and reproductive services that are not accessible in their state of residence (5%).
- Company matches (including double) for employee donations to groups that support reproductive rights (4%).

While smaller businesses may not be able to offer this full package of support to help their employees when it comes to reproductive rights, even more modest support can help – and will send an important message to employees that you care about their dignity, autonomy, and healthcare needs. In addition, more resources are becoming available even for smaller employers. For example, in late July, Tri-Net, an HR and payroll services company, created a benefits product for small businesses that will allow its customers to offer tax-free reimbursement for out-of-state medical travel, including for abortion. Tri-Net will act as the plan administrator, processing claims and handling reimbursement payments, which allows [employees seeking assistance to remain anonymous to their employers](#). This might be a way forward for many smaller workplaces. Although the quality and breadth of availability for this particular type of benefit product is yet to be determined, it exemplifies the flexibility and creativity that will increasingly be necessary as businesses adjust to the new post-*Dobbs* reality.

If you are living in a non-free state, please consult an attorney regarding the impact of your state's laws on those seeking or providing abortions.

Learn more about LCR's [BizGrow](#) and [HealthJustice](#) initiatives.